LEAGUE CONSTRUCTION SDN. BHD.

v.

SETIA DEVELOPMENT SDN. BHD.

HIGH COURT MALAYA, KUALA LUMPUR
WAN HAMZAH J
[CIVIL SUIT NO. F 244 OF 1980]
10 APRIL 1981

CIVIL PROCEDURE: *Application to stay proceedings and reference to arbitration under s. 6, Arbitration Ordinance 1952 - Whether proper for defendant to apply without having entered conditional appearance or applied to set aside plaintiff's writ - Whether judgment in default of appearance properly signed - Order 12, rr. 6, 7, Rules of the High Court 1980.*

The plaintiff, in a claim for certain payments under a contract, served the writ on the defendant on 20 November 1980. The time for entering appearance expired on 29 November 1980. On 1 December 1980 the defendant filed a summons praying for an order that further proceedings in the action be stayed pursuant to s. 6 of the Arbitration Ordinance 1952 on the ground that the plaintiff and the defendant had agreed in the contract to refer and submit to arbitration all disputes arising out of or in connection with the contract. The defendant, however, had not filed any appearance, conditional or unconditional, in the suit. On the same date but after defendant had filed his summons for stay of proceedings the plaintiff filed judgment in default of appearance, which was afterwards signed by the Senior Assistant Registrar the same day.

It was submitted for the plaintiff that in order to apply for stay of the proceedings and reference to arbitration, the defendant should have filed a conditional appearance, and since he had not done so, the Senior Assistant Registrar had properly and correctly signed the judgment.

Held:

[1] The judgment in default of appearance must be set aside. It was proper for the defendant to apply by the summons for stay of proceedings without entering conditional appearance or applying to set aside the writ or service of the writ. It was irregular for the Senior Assistant Registrar to have signed the judgment in default while the summons was pending hearing.

A conditional appearance as provided by O. 12 rr. 6 and 7 Rules of the High Court, is for the purpose of:

(a) setting aside the writ or service of the writ, or notice of the writ, on him, or

(b) declaring that the writ or notice has not been duly served on him, or

(c) discharging any order giving leave to serve the notice on him out of the jurisdiction.

There does not seem to be any rule requiring that there must be application to set aside the writ or service of the writ, or notice of the writ in order that a defendant may apply for the stay of the proceedings and reference to arbitration.

Even if an application for an order to set aside the writ should have been made, such an application may be made without entering conditional appearance, as provided by r. 7(1), Rules of the High Court.

[2] The defendant was entitled to an order for stay of proceedings in the suit so that the parties submit their disputes to arbitration in accordance with the provisions of the contract. The position would have been different if the plaintiff had filed the judgment before the summons, in which event he would have been entitled to judgment in default of appearance and it would have been too late for the defendant to proceed with his summons.

Legislation referred to:
Arbitration Ordinance 1952, s. 6
Rules of the High Court 1980, O. 12 r. 6, 7, (1)

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Also found at [1982] CLJ 32